United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1323

To be argued by
AUDREY STRAUSS

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1323

B/S

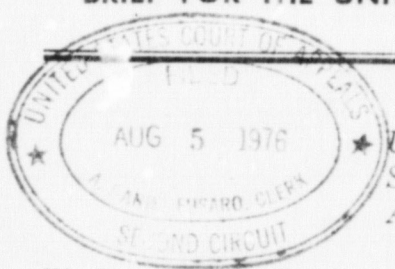
UNITED STATES OF AMERICA,
Appellee,

—v.—

JACKSON D. LEONARD,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA



ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

W. CULLEN MACDONALD,
AUDREY STRAUSS,
Assistant United States Attorneys,
Of Counsel.

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Jackson D. Leonard appeals from an order entered on June 24, 1976, in the United States District Court for the Southern District of New York, the Honorable Richard Owen presiding, denying his motion for a new trial on the ground of newly discovered evidence, pursuant to Rule 33, *Fed. R. Crim. P.*

Indictment 74 Cr. 599 was filed on June 13, 1974, charging Leonard with having wilfully falsified his 1967 and 1968 personal income tax returns in violation of Section 7206(1) of Title 26, United States Code. (1a, 6a).*

* Numerical references followed by "a" are to the appellant's appendix filed upon this appeal; "GX" and "DX" refer to Government's and defendant's exhibits at the indicated "E" page of the exhibit volume filed in the original appeal; and "Br." refers to the Appellant's Brief.

His trial commenced on January 13, 1975, and concluded on January 21, 1975, with jury verdicts of guilty as to both counts.

On March 7, 1975, after denying Leonard's alternative motions for a judgment of acquittal under Rule 29 or for a new trial under Rule 33, Judge Owen sentenced Leonard on each of Counts One and Two to eighteen month concurrent terms of imprisonment, fifteen months of which was suspended. In addition, the Court imposed a fine of $5,000 on each count, as well as costs of prosecution. (4a).

Leonard argued in his original appeal, *inter alia*, that the Government had improperly secured the presence of Mrs. Eva Brooke as a trial witness against him by intimidating her with an arrest and extradition threat which was without proper legal basis. (Leonard's original Reply Brief at 30-33). Specifically he claimed that a "Letter Rogatory (*sic.*) . . . was both improperly served . . . and used for an improper purpose" since it requested that "the English court take 'such other steps (such as *arrest and extradition*) that may be necessary' " to overcome Mrs. Brooke's resistance to the subpoena requiring her presence at Leonard's trial. (*Id.* at 31; emphasis in original). He argued:

> " . . . that the government, fully aware of the improper request contained in the Letter Rogatory, never intended to seek the aid of an English Court, but instead served it on Mrs. Brooke directly, realizing that she would not know it was improper and would be intimidated into abiding by its terms." (*Id.* at 32).

Further proof of her having been "so intimidated by these events was purportedly supplied by her admission during cross-examination that she had not telephoned Leonard

"to inform him, simply as a matter of courtesy, that she was to be a witness." (*Id.* at 32).

This Court rejected Leonard's claim on the three-fold basis that the point had not been properly raised; that it was doubtful merit; and that, even assuming some impropriety in the method of obtaining the attendance of a witness, that would not require reversal of a conviction. Judge Friendly wrote:

> "Counsel make a variety of attacks, unnecessary to detail, on the methods by which the prosecution secured the presence of Mrs. Brooke. Apart from the fact that it is not clear that these objections were raised below and that they are of doubtful merit, the short answer is that impropriety in the method by which the prosecution has obtained the attendance of a witness, while a proper subject for cross-examination or proof insofar as the impropriety may go the weight of the witness' testimony, is not of itself a ground for reversal." *United States* v. *Leonard*, 524 F.2d 1076, 1093 (2d Cir. 1975), *cert. denied*, 44 U.S.L.W. 3624 (May 3, 1976).

In the ten months following this decision, Leonard petitioned for rehearing and *certiorari* in this and the United States Supreme Court. While the petition for *certiorari* was pending, defense counsel submitted to the Supreme Court an affidavit from Mrs. Brooke, attesting to the claimed threats to procure her attendance. Upon the denial of *certiorari*, receipt of the mandate in the District Court, and the resultant issuance of his surrender notice, Leonard filed the current motion for a new trial, attaching the same affidavit by Mrs. Brooke previously submitted to the Supreme Court.

On June 24, 1976, after affording a full hearing, Judge Owen denied the motion for the several reasons which he dictated into the record. (56a-58a). In addition, Judge Owen denied Leonard's further motion for a stay of his surrender pending the determination of this appeal, although he did grant a short postponement to allow the defendant to apply to this Court for the stay. (58a).

On June 30, 1976, Leonard moved for a stay in this Court. That motion was denied by Judge Mulligan on July 8, 1976. Leonard began serving his sentence on the following day.

Statement of Facts

Prior to the commencement of Leonard's trial, Mrs. Eva Brooke was duly served with a subpoena commanding her attendance to testify and to give evidence for the United States. (17a, 24a, 29a-30a, 125a). The subpoena included the standard warning that she was:

> "not to depart the Court without leave thereof, or of the United States Attorney.
>
> And for failure to attend you will be deemed guilty of contempt of Court and liable to penalties of the law." (Form No. USA-33s-220 (Rev. 1-1-71) Court Subpoena (Gov't.)).

On January 14, 1976, the second day of Leonard's trial, the Government represented to the District Court that although Mrs. Brooke had been "previously served with a subpoena requiring her attendance as a witness" at trial, she was then in England and she had "resisted coming to New York in compliance with the subpoena even though the United States has agreed to bear all her reasonable travel expenses." (24a). The Government submitted for Judge Owen's signature an international

request for judicial assistance addressed to the appropriate judicial authority in London, England. After reciting the pertinent facts as to service of the trial subpoena and Mrs. Brooke's recalcitrance together with a description of the materiality of her testimony, the request concluded:

> "5. Accordingly, it is hereby requested, if appropriate pursuant to the Foreign Tribunals Evidence Act of 1856 as construed in terms of the Extradition Act of 1870, or pursuant to other pertinent laws of the United Kingdom, that the appropriate judicial authority in London, England, enter such orders as British law permits, directing EVA BROOKE to appear as soon as physically possible before the undersigned in Room 518 of the United States Courthouse, 40 Centre Street, New York, New York, to give evidence in the criminal trial now pending before this Court, and directing such other steps (such as arrest and extradition) that may be necessary in order to secure compliance with such orders."
>
> "6. This Court expresses its appreciation to the appropriate judicial authority in London, England, for its courtesy and assistance in this matter." (24a-25a).

Judge Owen signed the request which was immediately and publicly docketed by the clerk of the District Court. (2a).

In the meantime, according to Mrs. Brooke's current affidavit, she had repeatedly declined telephoned requests that she appear and testify. (18a). At one point during a trial session, she called New York and spoke to someone associated with the United States Attorney's office who, she recalled, "became very rude" and advised her that

if she failed to attend that the Government "would have [her] arrested in England and extradited to the United States and that in the future [she] would never be allowed into the United States again." (19a). As might have been expected, such advice did not result in her capitulation and agreement to come. Instead, it was only on the following day, after speaking directly with the Assistant United States Attorney handling the case, that she agreed to fly to New York. Her affidavit makes no claim that in that conversation the consequences of her disobedience to the subpoena were repeated or confirmed, although it does recite that she felt generally "exhausted from the daily pressure and terrified that if [she] failed to come to the United States, [that she] would be subject to arrest and extradition." (19a). In any event on the following day, January 16, 1976, she appeared and testified as the final Government witness in its case-in-chief.

Mrs. Brooke's testimony established that Leonard had falsified his 1971 tax return in which he denied any control over a foreign bank account. (GX 83 at E. 373). She described Leonard's attempt during the summer of 1971 to hire her now deceased husband with an offer of $100,000 a year "half to be paid in dollars and the other half to be deposited in a Swiss bank account." (*United States* v. *Leonard*, *supra*, at 1086; 86a-89a). During that conversation she had asked Leonard about the method by which one opened a numbered Swiss account. While at first being "evasive about how to get one", ultimately Leonard admitted to having one himself. (88a-89a).

At the conclusion of Mrs. Brooke's direct examination, the District Court granted an early adjournment for the day. Then, at defense counsel's specific request and in the privacy of the robing room, the court advised Mrs. Brooke that defense counsel wanted to interview her before beginning his cross-examination. (100a). She

readily agreed, and, outside of the presence of any representative of the Government, thereafter spent the next hour or more with defense counsel. During this interview she disclosed a handwritten first draft of a final, signed and typed affidavit which had been provided to defense counsel as 3500 material. (DX AF at E. 596-599; 146a-147a). According to defense counsel's affidavit she was not asked to describe, and she did not volunteer, the contents of any of the conversations leading up to her flight to New York. (66a-67a). She was simply asked how she had come to be testifying at Leonard's trial, to which she responded that "she had been subpoenaed and that the Government paid her airfare from London." (66a).

On the morning of January 17, 1975, Mrs. Brooke resumed the stand and underwent cross-examination and brief redirect. At no point during her testimony did she manifest any sign that she was terrified. Indeed, a reading of her testimony is, perhaps, the best demonstration that she was an intelligent, alert and articulate witness fully capable of reporting anything which she felt to have been untoward. As Judge Owen pointed out during the hearing on the current motion, he had observed that:

> "she was very distressed to have to get on the stand and state a conversation in a hotel room which would be damaging to a man that her husband had had social dealings with. I don't think she was frightened, I think she wished that she were any place but here. That was my personal view.
>
> * * *
>
> The Court: I don't think she was frightened at all. This was a very bright woman who just didn't want to be there, that's all.
>
> * * *

> The Court: I talked to her because I remember Mr. Tigue wanted to speak to her, and I remember having a little chat with her in which I said, Mrs. Brooke, the law does not require you to speak to anybody you don't want to speak with, but Mr. Tigue for Mr. Leonard would like to speak to you. If you want to talk to him you may. If you don't want to you don't have to.
>
> I had a very intelligent response, and she said something like, I would prefer to, or I want to, or something of that kind. I didn't get any feeling of hesitancy or fear. I just got a feeling of regret and discomfort." (35a, 36a).

Finally, and perhaps most importantly, there is no claim that Mrs. Brooke's recollection of Leonard's 1971 offer to her husband has altered. Her current affidavit contains nothing which hints that her trial testimony was not accurate in every respect. Each of the essential details of the meeting between Leonard, Mr. Brooke, and their wives, was reduced to writing in her draft and final affidavit more than a year before the institution of this tax prosecution.* Moreover, neither Leonard nor his wife claimed at trial, or even now, that the discussion about the Swiss bank was in any way different from Mrs. Brooke's account of it at trial.

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* In her first draft, she wrote that Leonard had offered "100,000 any of which he would deposit in a Swiss bank." (DX AF at E. 597). In the second draft, this was changed to half being "paid in the U.S. and half in a Swiss Bank account" (DX AG at E. 601) and then she added that Leonard "said that he himself had a Swiss bank account and he indicated to me they were easy to open. He gave no indication of the size of his bank account or how long he had had it, but he always said he was worth millions." (*Id.* at 602). The signed final was essentially identical. (DX AE at E. 587).

At the conclusion of the hearing on the current motion, Judge Owen explicitly found:

> 1. That the warning given to Mrs. Brooke concerning possible arrest and extradition was not "inappropriate in the circumstances" when given to "a recalcitrant witness . . . who is going to England so she doesn't have to respond to the subpoena" (57a);
>
> 2. That, in any event, the making of such a statement to a witness by a government representative need not be disclosed to the cross-examiner (57a);
>
> 3. That neither Mrs. Brooke nor Leonard claimed "that she testified in any way other than truthfully on the merits" (57a-58a);
>
> 4. That such a statement to a witness, if admitted at trial, was far from anything that in my judgment, would probably produce a different verdict" (57a); and
>
> 5. That, in any event, there was a failure to establish the required "exercise of due diligence" by defense counsel in the matter (57a).

ARGUMENT

The District Court Was Clearly Correct in Each of Its Findings and in its Refusal to Award a New Trial.

Leonard argues that the District Court erroneously refused to award him a new trial because it failed to recognize that governmental misconduct influenced Mrs. Brooke's testimony and that a skillful cross-examiner could have undermined the Government's entire case by

exploiting that fact. The argument is entirely without merit and should be rejected for several independent reasons.

First and foremost, the question of the purported threats to obtain Mrs. Brooke's presence at Leonard's trial was previously litigated upon the direct appeal in this case. At that time, appellant presented virtually the same arguments pressed again now. (Leonard's original Reply Brief at 30-33). Judge Friendly noted the argument and disposed of it in short order, finding that it did not amount to a ground for reversal. *United States* v. *Leonard*, *supra*, 524 F.2d at 1093. This adverse ruling constitutes the law of the case, precluding the second review that Leonard seeks. *See United States* v. *Furey*, 514 F.2d 1098, 1102 (2d Cir. 1975).

Leonard's answer to this argument is that Mrs. Brooke's affidavit was not available until after the affirmance of his conviction. (Br. at 4n.). However, that should make no difference here. The greatest benefit which Leonard could hope to derive from Mrs. Brooke's affidavit would be that this Court would conclude that some impropriety occurred in the method by which the Government obtained her attendance at trial. In deciding the point against Leonard upon the direct appeal, Judge Friendly assumed that conclusion and nevertheless dismissed it is insufficient to warrant reversal. It is difficult to see why Leonard should now be entitled to yet another appellate review of that very point.

However, assuming *arguendo* that this Court were to reconsider Leonard's claim, the decision below should be affirmed on its merits. Leonard asserts that in denying his motion for a new trial the district court applied "the wrong legal standard". (Br. at 26). Appellant urges that a motion for a new trial should be granted if, among

other criteria, the court determines that the newly discovered evidence "will probably produce a different verdict." (Br. at 26). Leonard also cites the test of *United States* v. *Miller*, 411 F.2d 825, 832 (2d Cir. 1969), urging that his burden was merely to demonstrate that "developed by skilled counsel as it would have been," the new evidence "could have induced a reasonable doubt in the minds of enough jurors to avoid conviction." (Br. 27, 32).* However, recently the Supreme Court upheld denial of a motion for a new trial where the District Court, in the face of the new evidence, but upon consideration of the entire record, remained convinced of the defendant's guilt beyond a reasonable doubt. *United States* v. *Agurs*, 44 U.S.L.W. 5013, 5017-18 (June 24, 1976). Justices Marshall and Brennan, dissenting, urged the "skilled counsel" test upon the Court in almost the exact language of the *Miller* case upon which Leonard relies. However, the failure of the dissenters to persuade the majority to accept that standard leaves little question that the Supreme Court has explicitly rejected the precise legal standard advocated by the defendant in this case.

Applying the approach prescribed by *Agurs*, Judge Owens made his findings utilizing standards that were, if anything, too generous to the defendant. He found that if the so-called threats to Mrs. Brooke had been revealed at trial they would probably not have produced

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* This test has been followed in the past in numerous cases in this Circuit. *See United States* v. *Morell*, 524 F.2d 550, 553 (2d Cir. 1975); *United States* v. *Rosner*, 516 F.2d 269, 272 (2d Cir. 1975), *petition for Cert. filed* 44 U.S.L.W. 3284 (U.S. Sept. 29, 1975) (No 75-492); *United States* v *Seijo*, 514 F.2d 1357, 1364 (2d Cir. 1975); *Grant* v. *Alldredge*, 498 F.2d 376, 380 (2d Cir. 1974); *United States* v. *Badalamente*, 507 F.2d 12, 18 (2d Cir. 1974); *United States* v. *Pfingst*, 490 F.2d 262, 273 (2d Cir. 1973), *cert. denied*, 417 U.S. 919 (1974); *United States* v. *Kahn*, 472 F.2d 272, 287 (2d Cir.), *cert. denied*, 411 U.S. 982 (1973).

a different verdict. (57a). While under *Agurs* the district court was entitled to limit its determination to the impact of the new evidence on its view of the defendant's guilt, here the district court gave Leonard the benefit of reviewing the matter from a jury's perspective. Even having applied that standard, the court found that a new trial was not warranted.

The district court's finding receives firm support from defense counsel's own inability to show that the so-called threats to Mrs. Brooke affected her trial testimony in any way. Although Judge Owen described the purported threats as "merely preaching", there is no claim in Mrs. Brooke's affidavit that her testimony at trial was influenced or even shaded as a result of the Government's actions in procuring her presence. Furthermore, in the broader context of the full case against Leonard, it would have been astounding if the District Court had concluded that the issue of these purported threats could have affected the finding of guilt. Indeed, this Court noted in its prior opinion that the record so convincingly demonstrated Leonard's guilt that the Government had unnecessarily gilded the lily with proof of similar acts. *See United States* v. *Leonard*, *supra* at 1084, 1090-1091.*

Leonard endeavors to give his claim otherwise undeserved importance by casting this as a case of governmental misconduct. (Br. at 26).** Of course, Leonard

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* In Agurs, the Supreme Court stated that where "there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial." 44 U.S.L.W. at 5017.

** In conjunction with this, the defendant tries to dispose of *Agurs* in a footnote by limiting its holding to cases where there is no "governmental misconduct." (Br. at 26 n.) That limitation

[Footnote continued on following page]

failed to convince Judge Owen that anything improper occurred here and in support of the claim of impropriety he fails to cite any authority whatsoever, save for his own *ipse dixit*. At its most extreme, the claim is that Mrs. Brooke was told to obey the subpoena on pain of being, in the words of her affidavit, "subject to arrest and extradition." (19a). This amounted to no more than a warning of the likely consequences of her recalcitrance, an entirely proper warning for the Government to convey. By analogy, when a witness has disobeyed the command of a subpoena but remains within this country, the warning on a federal subpoena—"for failure to attend you will be deemed guilty of contempt of Court and liable to penalties of the law"—could surely be read aloud without breach of the bounds of propriety. Similarly, when the witness has fled the country, it is no more improper to give the equivalent message with the further advice that application will be made for an arrest and extradition.*

Appellant has not only failed in his attempt to show that governmental misconduct permeates this record, he has neglected to demonstrate that the newly discovered

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of *Agurs* finds no support in the Supreme Court's opinion which carves out an exception for knowing or negligent use of perjured testimony by the prosecution, but fails to allude to this broader exception for governmental misconduct. Indeed, the majority opinion rejects a test which measures the culpability of the prosecutor in favor of a test which measures the materiality of the evidence. 44 U.S.L.W. at 5017.

* There can be no claim of a lack of good faith in communicating that advice in this case, where the Government prepared the documents necessary to compel an appearance through "such orders as British law permits." (22a-25a). Apart from good faith, as a matter of law, Leonard's addenda still fail to prove that absent compliance Mrs. Brooke could not have been arrested and extradited as an "accused person . . . convicted for contumacy." (See § 26 of the Extradition Act, Addendum D at 67).

evidence would be admissible at a new trial, were one granted to him. Leonard has yet to provide any authority here or below suggesting that it would have been proper to examine Mrs. Brooke as to her duty to testify; the coercive force of the subpoena; the language of the international request; or any interpretations thereof that were expressed by persons associated with the prosecution. To use the claimed threats to impeach Mrs. Brooke's testimony, these threats should have had, at least arguably, some impact on the substance of her testimony. Notably, appellant's brief fails to even speak to this point, making instead a logical leap from the claim of governmental misconduct to the assumption that Mrs. Brooke's testimony was affected. (Br. at 31). In fact, this assumption makes no sense. Once Mrs. Brooke appeared in New York voluntarily, any purported threat of arrest and extradition lost all import. Thus, in reality and in contrast to the suggestions of appellant's brief, Mrs. Brooke did not testify under the pressure of some immediate governmental threat; the legal consequences of failure to comply with the subpoena were by then a moot question. Given this, it is difficult to see how the alleged threats would have caused a bias against the defendant susceptible to exploration upon cross-examination.*

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* The more logical assumption is that any bias caused by the claimed threats would be a bias against the Government. In any event, it is apparent from the factual context of Mrs. Brooke's testimony that her abiding bias in the case was one in favor of Leonard and that she was not anxious to make herself available to testify against him. One cannot help but wonder whether skillful trial counsel would have voluntarily exposed to the jury the resistance that the Government met in its attempt to produce Mrs. Brooke at trial. The revelation of her effort to help Leonard by staying in England during the trial would have only added credibility to the very damaging testimony which she gave against him once she appeared.

Indeed, it is doubtful that trial counsel would have been permitted to pursue so speculative a line of cross-examination as the bias alleged to have been engendered by these "threats." Had this line of cross been undertaken, the trial court in its discretion could have properly excluded it. *See United States* v. *Dorfman*, 470 F.2d 246, 248 (2d Cir. 1972), *cert. denied*, 211 U.S. 923 (1973) (*held* that evidence of a Government witness' bias or motive to lie was properly excluded in light of "the need to keep the trial from being sidetracked on collateral issues"); *United States* v. *Higgins*, 362 F.2d 462, 465 (7th Cir.), *cert. denied*, 385 U.S. 945 (1966) (*held* that narcotics agents' threats to defendant were not admissible where corroborative proof of truthfulness of agent's observations antedate the threats); *Lott* v. *United States*, 230 F.2d 915, 918 (5th Cir.), *cert. denied*, 351 U.S. 953 (1956) (*held* that claim of Government witness' bias to help incarcerated brother was too speculative to be permitted). *See also United States* v. *Jenkins*, 510 F.2d 495, 500 (2d Cir. 1975); *United States* v. *Reed*, 526 F.2d 740, 743 (2d Cir. 1975), *cert. denied*, 96 S. Ct. 1431 (Mar. 8, 1976); *United States* v. *Kahn*, 472 F.2d 272, 280-281 (2d Cir.), *cert. denied*, 411 U.S. 982 (1973).*

As part of his effort to keep this issue alive, Leonard further argues that trial counsel exercised the requisite due diligence in locating the new evidence. To make this argument, appellant is forced to contend that Mrs. Brooke "withheld the frightening circumstances surrounding her

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* Neither of the cases which Leonard cites, *United States* v. *Miller*, *supra*, and *United States* v. *Badalamente*, *supra*, is authority for the admissibility here of the omitted proof. *Miller* involved the use of hypnosis by the prosecutor on a witness, a bizarre factual occurrence far removed from Leonard's claim here. *Badalamente* involved a series of equally strange claims by a Government witness that he had been induced by the prosecutor to commit perjury and other crimes, but which really demonstrated that he was either lying or deranged.

testimony." (Br. at 22). However, Leonard has produced no support for his assertion that Mrs. Brooke "withheld" the information and it is apparent that she merely failed to volunteer information which trial counsel failed to seek. Given the overnight adjournment and the full opportunity for interviewing Mrs. Brooke, it was incumbent upon trial counsel to have, in the words of the District Court:

> "pressed around a little more [so that] he could have ascertained these facts and [that he] was one or two questions away from asking it and he went on to something else." (57a).

Judge Owen properly held that counsel's single conclusory question was simply not the equivalent of asking "her the right questions" necessary to finding the requisite diligence. (32a). The district court's well-supported finding that such diligence was lacking is independently dispositive of this appeal. *See United States* v. *Slutsky*, 514 F.2d 1222, 1225 (2d Cir. 1975).

CONCLUSION

The order denying the motion for a new trial should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

W. CULLEN MACDONALD,
AUDREY STRAUSS,
Assistant United States Attorneys,
Of Counsel.

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Form 280 A - Affidavit of Service by mail

AFFIDAVIT OF MAILING

State of New York)
County of New York)

Steven A. Levy being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 5th day of August he served a copy of the within brief - U.S. v Leanord by placing the same in a properly postpaid franked envelope addressed:

James Schreiber
Walter Conston Schurtman & Gumpel, P.C.
280 Park Avenue - West Building
New York, N.Y. 10017

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing the United States Courthouse Annex, One St. Andrew's Plaza, Borough of Manhattan, City of New York.

Steven A. Levy

Sworn to before me this
5th day of August, 1976
Alma Hanson

ALMA HANSON
NOTARY PUBLIC, State of New York
No. 24-6763450 Qualified in Kings Co.
Commission Expires March 30, 1976